

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDREW ZACK,

Defendant.

NO. CR-10-2130-LRS

**ORDER DENYING DEFENDANT'S
MOTION FOR RECONSIDERATION**

BEFORE THE COURT, at the scheduled pretrial conference on September 15, 2011, was Defendant Zack's Motion for Reconsideration (ECF No. 78), and various other pending discovery motions. This order is entered to memorialize and supplement the Court's oral rulings.

Motion for Reconsideration

Defendant requests the Court to reconsider its Order Denying Defendant's Motion to Suppress (ECF No. 66), asserting that the evidence that was introduced at the evidentiary hearing altered the analysis of the issues raised in the motion to suppress. The Court disagrees and finds that Defendant's motion for reconsideration should be denied.

A. Probable Cause

Police may arrest a person without a warrant if the arrest

1 is supported by probable cause. *United States v. Buckner*, 179 F.3d 834,
2 837 (9th Cir. 1999) (citations omitted). "Probable cause exists when, under
3 the totality of the circumstances known to the arresting officers, a
4 prudent person would have concluded that there was a fair probability
5 that [the defendant] had committed a crime." *Id.* (quoting *United States*
6 *v. Garza*, 980 F.2d 546, 550 (9 Cir. 1992)). Probable cause may exist
7 where the source of information is "an eyewitness to the crime," even "in
8 the absence of an independent showing of the reliability of the source,"
9 presuming "that the witness is fairly certain of the identification."
10 *United States v. Hammond*, 666 F.2d 435, 439 (9th Cir. 1982).

11
12 Defendant argues that the officers should not have relied upon the
13 information received from 16 year old Ethan Stevens ("Stevens") because
14 he had told the officers he was using methamphetamine on the night he
15 reported the incident that resulted in Defendant's charge. Defendant also
16 argues that Stevens was not credible because: (1) Officer Whitefoot once
17 attempted to find Stevens in relation to a criminal investigation; (2)
18 Stevens and his brother were known to get "into quite a bit of trouble";
19 and (3) Stevens and his brother had previously been suspects in fights,
20 broken windows, thefts, and possibly an assault with a weapon.

21 The government responds: (1) The officers were aware that the
22 Defendant and Stevens were either friends or family members; (2)
23 Defendant had asked Stevens to shoot him; (3) Defendant then pointed the
24 firearm at Stevens and stated, "I am going to kill you;" (4) Defendant
25 had recently ingested methamphetamine; (5) Stevens reported that the
26

1 firearm was loaded; (6) Stevens immediately reported the incident; (7)
2 Stevens reported that there were at least two additional firearms in the
3 residence; and (8) Stevens claimed he was carrying a knife to protect
4 himself from the Defendant.

5 The Court finds that there was probable cause to arrest the
6 Defendant based upon a totality of circumstances. The testimony showed
7 that Stevens provided the officers with sufficiently detailed facts to
8 cause a reasonable person to believe that a crime had been committed and
9 that the Defendant was the perpetrator. Here, there is no dispute that
10 Stevens was certain of the identification of the Defendant. There is no
11 dispute that the officers knew that Stevens and the Defendant had a close
12 relationship. Although it is true that Stevens admitted that he had
13 recently ingested methamphetamine, Officer Whitefoot testified that he
14 did not observe any symptoms of methamphetamine use. Officer Whitefoot
15 observed that Stevens "sounded scared" which would not be unusual if
16 someone had recently pointed a loaded firearm at your person and declared
17 they were going to kill you.

18
19 B. Arrest Inside the Residence

20 Defendant argues that "the Government has not shown that exigent
21 circumstances existed in anything but the minds of the officers."
22 Defendant argues that no exigent circumstances existed because: (1) one
23 hour transpired from the time that Officer Whitefoot first spoke to
24 Stevens; and (2) the officers did not attempt to obtain a search warrant.
25
26

1 The government asserts that the officers had probable cause to
2 apprehend the Defendant by means of a warrantless search due to exigent
3 circumstances. The Court agrees with the government. Exigent
4 circumstances have been defined as "those in which a substantial risk of
5 harm to the persons involved or the law enforcement process would arise
6 if police were to delay a search [or arrest] until a warrant could be
7 obtained. See *United States v. Al-Azzawy*, 784 F.2d 890, 894 (9th Cir.
8 1986).

9
10 In the present case, it appears that the officers acted quickly
11 under the circumstances and based upon the information known to them.
12 Stevens contacted Officer Whitefoot at 12:04 a.m. At that time, Officer
13 Whitefoot learned: (1) Stevens had been at the Defendant's house; (2) the
14 Defendant pointed a gun at him and said he was going to kill him; (3) the
15 gun was a six-shot revolver; (4) Stevens was scared; and (5) Stevens had
16 a knife for protection. Officer Whitefoot then instructed Stevens to go
17 to another residence and wait for him. However, Officer Rogers¹ was not
18 present until 12:39 a.m. It was only after speaking to Stevens that
19 Officer Rogers was aware of all of the circumstances which required the
20 officers to act quickly to apprehend the Defendant. Only approximately
21
22

23 ¹Officer Rogers was the superior officer on duty. Officer Whitefoot
24 had two years of law enforcement experience. Officer Rogers had six years
25 of law enforcement experience. Officer Rogers and Officer Whitefoot were
26 the only tribal police officers working that early morning.

1 20 minutes elapsed from the time Officer Rogers heard the complete story
2 until contact was made at the front door. Therefore, Defendant's
3 argument that one hour had elapsed is not entirely accurate based on the
4 testimony. The Court finds that based on the testimony at the
5 evidentiary hearing, the officers had probable cause to apprehend the
6 Defendant. Furthermore, exigent circumstances existed which required the
7 officers to apprehend the Defendant without delay. Under these
8 circumstances, the officers were not required to first obtain a search
9 warrant.

10
11 C. Consent to Search the Residence

12 Defendant argues that the Court should re-examine the issue of
13 Winona Zack's consent to search the residence. The government responds
14 that Winona's story is contradicted by two sworn police officers who
15 have no motive to fabricate a story, which Defendant fails to address in
16 his motion for reconsideration. The government concludes that Winona
17 Zack's testimony is simply not believable and she had a motive to
18 fabricate a story.

19 The Court finds that Winona's consent to search the home was
20 voluntary. Officer Whitefoot apprehended the Defendant. At that
21 time, Officer Rogers was standing outside of the residence. Officer
22 Rogers then spoke with Winona. Winona expressed her desire to know
23 exactly what was happening. Winona then invited Officer Rogers into her
24 home. Officer Rogers then entered the home and explained the
25 circumstances to Winona. Officer Rogers then asked for consent to search.
26

1 Winona then voluntarily provided consent to search the residence based
2 on the weight of the evidence. The Court also notes that police officers
3 had been to Winona's home "several times in the past, usually looking for
4 one of the neighborhood kids, and that by her testimony, she (Winona) had
5 always cooperated and let them come in and search the home." Although
6 Winona Zack argues that on this one occasion, after numerous searches in
7 the past, she asked the tribal police officer to explain her rights
8 concerning consent to search, her testimony at the evidentiary hearing
9 is contradicted by two sworn police officers who have no motive to
10 fabricate a story.
11

12 The Court concludes that the officers had probable cause to believe
13 that the Defendant was armed and that he posed a danger to law
14 enforcement, himself, and others. The officers were invited into the
15 residence, they observed the Defendant, and had probable cause to place
16 him under arrest. The Court further finds, as it did at the evidentiary
17 hearing, that Winona voluntarily provided consent to search her
18 residence. At the time the officers spoke with Winona, no firearms were
19 drawn, no threats were made, she was not in custody, and it appears she
20 voluntarily provided consent to search the residence, as she had always
21 done in the past. Accordingly,
22

23 **IT IS HEREBY ORDERED:**

24 1. Defendant's Motion for Reconsideration, **ECF No. 78**, is
25 respectfully **DENIED**.
26

4. Defendant's Motion to Compel Grand Jury Transcripts, **ECF No. 42**, is **GRANTED**, however, the government need not provide such transcripts until two weeks prior to trial.

6. The 2-day jury trial **REMAINS SET** for **October 24, 2011** in **Yakima**.

DATED this 21st day of September, 2011.

LONNY R. SUKO
United States District Judge